

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DONALD RAY WALKER,

Plaintiff,

v.

DONALD POMPAN, et al.,

Defendants.

No. C-10-1425 TEH (PR)

ORDER GRANTING DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT AND
DENYING PLAINTIFF'S CROSS-
MOTIONS FOR SUMMARY JUDGMENT

Doc. ## 14, 18, 19

Plaintiff, a prisoner at the Correctional Training Facility ("CTF") in Soledad, California, has filed the instant pro se civil rights action under 42 USC § 1983 alleging that defendants were deliberately indifferent to his serious medical needs. Defendants now move for summary judgment. Doc. #14. Plaintiff has filed an opposition, and defendants have filed a reply. Doc. #20. Plaintiff has filed two cross-motions for summary judgment (Doc. ## 18 and 19), and defendants have filed an opposition (Doc. #21). For the reasons listed below, defendant's motion for summary judgment (Doc. #14) is GRANTED and plaintiff's cross-motions for summary judgment (Doc. ## 18 and 19) are DENIED.

I

Plaintiff Donald Ray Walker fractured his right femur prior to his incarceration.¹ Doc. #1 at 9.² The fracture healed and left his right leg approximately half an inch shorter than his left leg. Id.

In early 2006, plaintiff complained of severe knee and spine pain. Doc. #19 at 3. On February 3, 2006, Dr. Friederichs examined plaintiff's right knee after plaintiff reported feeling pain related to a sprain. Doc. #14, Exh. A. Dr. Friederichs ordered x-rays of plaintiff's knees. Id. Dr. Catalano of Salinas Valley Radiologists interpreted the x-rays and reported that plaintiff had moderate degenerative arthritis in both knees. (Doc. #14, Exh. B.

During a subsequent knee examination on April 3, 2006, plaintiff again complained of pain and informed Dr. Friederichs of the femur fracture that left his right leg half an inch shorter than his left leg. Doc. #14, Exh. C. Dr. Friederichs referred plaintiff to an orthotist to obtain a shoe lift to remedy the height discrepancy, and issued plaintiff a chrono (a note from a prison official documenting medical orders) for knee braces. Plaintiff received a half inch shoe lift on June 23, 2006. Doc. #19 at 3.

Plaintiff informed Dr. Friedreichs that specialists at Santa Clara Valley Medical Center in San Jose, California, had

¹The record is unclear as to whether the original fracture took place in 1972 (Doc. #19 at 2) or in 1993 (Doc. #1 at 9). However, the date of the original fracture is not relevant to the Court's analysis.

²As referenced herein, the pages of the complaint (Doc. #1) have been assigned numbers sequentially, beginning with the title page.

1 stated that plaintiff required full knee replacement. Doc. #1 at 5.
2 Instead of ordering full knee replacement, on April 26, 2006, Dr.
3 Friederichs referred plaintiff for an MRI of his right knee. Doc.
4 #14, Exh. D. Dr. Misa Hosohama of Salinas Valley Radiologists
5 interpreted the MRI on May 15, 2006 and reported two separate tears.
6 Doc. #14, Exh. C. After reviewing the results of plaintiff's MRI,
7 Dr. Friederichs referred plaintiff to Dr. Pompan, an orthopedist,
8 for a consultation regarding the MRI results. Doc. #1 at 5. On
9 September 22, 2006, Dr. Pompan performed an orthopedic consult on
10 plaintiff, and obtained a history. Dr. Pompan recommended
11 arthroscopic surgery on plaintiff's right knee, which Dr.
12 Friederichs approved. Doc. #14, Exh. H.

13 Prior to conducting the surgery, on November 7, 2006, Dr.
14 Pompan examined plaintiff's right knee again and informed plaintiff
15 that there were no guarantees as to the outcome of the surgery and
16 that plaintiff's pain might worsen. Doc #14, Exh. I. Dr. Pompan's
17 notes state that plaintiff responded that he understood and still
18 wanted to have the surgery. Id. While plaintiff does not dispute
19 Dr. Pompan's summary of the November 7, 2006 conversation, he argues
20 that Dr. Pompan should have warned him then that the surgery could
21 result in an even shorter right leg. Plaintiff states that if Dr.
22 Pompan had informed him of this, he would not have consented to the
23 surgery. Doc. #1 at 9.

24 On November 15, 2006, Dr. Pompan noted "the patient does
25 have arthritis but at this point [it is] not severe enough to
26 warrant a total knee replacement." Doc. #1 at 14-15. On that same
27 day, Dr. Pompan performed the surgery without any complications.

1 Id. Plaintiff, however, claims that as a result of the knee
2 surgery, his right leg is an additional $\frac{1}{2}$ inch shorter which causes
3 him severe pain and back and hip alignment problems. Id. at 9.

4 Dr. Pompan examined plaintiff in a follow up appointment on
5 November 20, 2006. He noted that the plaintiff had pain and mild
6 swelling, instructed plaintiff to use crutches and scheduled another
7 follow-up appointment. Doc. #14, Exh. J. On December 26, 2006, Dr.
8 Pompan examined plaintiff again. Plaintiff complained of some
9 stiffness, but stated that he was improving. Dr. Pompan diagnosed
10 plaintiff with osteoarthritis and suggested exercises to improve his
11 range of motion. Doc. #14, Exh. K.

12 During appointments in 2008 and 2009, plaintiff complained
13 of severe back and knee pain to Dr. Friederichs; during an
14 examination in August 2009, Dr. Friederichs confirmed Dr. Pompan's
15 diagnosis of osteoarthritis and issued plaintiff a chrono for a
16 cane. Doc. #14, Exh. N. Dr. Friederichs told plaintiff that they
17 would need to some more work on his right knee." Doc. #18 at 11.

18 On March 16, 2009, Dr. Friederichs referred plaintiff for
19 another orthotics consult for a shoe insert to remedy the leg length
20 discrepancy. Doc #14, Exh. M. On March 25, 2009, plaintiff
21 received shoes, inserts, and a heel and sole lift from Birkholm
22 Orthopedic Services. Doc. #14, Exh. L. Plaintiff was provided with
23 a $\frac{3}{4}$ inch right leg shoe lift on May 7, 2010. Doc. #18 at 12.
24 Plaintiff claims that the shoe lift is inadequate because the leg
25 length discrepancy is greater than $\frac{3}{4}$ inch. Id. at 12. On
26 November 19, 2010, plaintiff saw a physical therapist that measured
27 his right leg and determined it to be between 1.5 and 1.75 inches
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shorter than his left leg. Id. at 11.

Plaintiff filed a health care complaint requesting a total knee replacement performed by someone other than Dr. Pompan. Doc. #19, Exh. O. Dr. Sepulveda reviewed plaintiff's medical file and concluding that plaintiff's medical records did not indicate that a full knee replacement was necessary. Id. Plaintiff submitted the complaint for second level review. Dr. Chudy reviewed plaintiff's medical file and also found that there was no indication that plaintiff needed a full knee replacement. Id. Plaintiff submitted the complaint for a third/director's level review. Doc. #19, Exh. P. After reviewing plaintiff's medical file, Dr. Walker denied plaintiff's appeal, finding that plaintiff's medical records indicated that he was receiving proper medical care and that surgery was not medically indicated. Id.

On October 26, 2010, Dr. Friederichs renewed plaintiff's chrono for a knee brace, ground floor cell, bottom bunk, wooden cane, and cotton bedding; Dr. Friederichs also referred plaintiff to physical therapy. Doc. #14, Exh. P. The physical therapists instructed plaintiff to do quadriceps strengthening exercises, which would alleviate some of plaintiff's knee pain. Doc. #14, Exh. P.

II

Summary judgment is proper where the pleadings, discovery and affidavits show that there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Material facts are those which may affect the outcome of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute as to a material fact is

genuine if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. Id.

The moving party bears the initial burden of identifying those portions of the pleadings, discovery and affidavits which demonstrate the absence of a genuine issue of material fact. Celotex Corp v. Catrett, 477 U.S. 317, 323 (1986). Where the moving party will have the burden of proof on an issue at trial, it must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party. But on an issue for which the opposing party will have the burden of proof at trial the moving party need only point out "that there is an absence of evidence to support the nonmoving party's case." Id. at 325.

Once the moving party meets its initial burden, the nonmoving party must go beyond the pleadings and, by its own affidavits or discovery, "set forth specific facts showing that there is a genuine issue for trial." Celotex Corp., 477 U.S. at 322 n.3. If the nonmoving party fails to make this showing, "the moving party is entitled to a judgment as a matter of law." Celotex Corp., 477 U.S. at 323 n.4.

III

Deliberate indifference to serious medical needs violates the Eighth Amendment's proscription against cruel and unusual punishment. Estelle v. Gamble, 429 U.S. 97, 104 (1976). In order to make a prima facie showing of deliberate indifference, the plaintiff must show the following: (1) he faced a serious medical need, and (2) the defendants were deliberately indifferent to that medical need, that is, the defendants knew of it and disregarded it

1 by failing to take reasonable measures to address it. See McGuckin
2 v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992) overruled on other
3 grounds by WMX Tech., Inc. v. Miller, 104 F.3d 1133, 1136 (9th Cir.
4 1997) (en banc); Farmer v. Brennan, 511 U.S. 825, 837 (1994).

5 A. Serious Medical Need

6 Plaintiff alleges that his knee pain constitutes a serious
7 medical need. "A 'serious' medical need exists if the failure to
8 treat a prisoner's condition could result in further significant
9 injury or the 'unnecessary and wanton infliction of pain.'"

10 McGuckin, 974 F.2d at 1059. Examples of a serious medical need
11 include the following: 1) an injury that a reasonable doctor or
12 patient would find important and worthy of comment or treatment,
13 2) presence of a medical condition that significantly affects an
14 individual's daily activities, or 3) the existence of chronic and
15 substantial pain. Id. at 1059-60 (citations omitted).

16 Plaintiff claims that his knee causes him excruciating
17 pain, Doc. #19 at 3, has been causing him pain for years, and that
18 it requires full replacement. Viewing the facts in the light most
19 favorable to plaintiff, plaintiff has established that his knee pain
20 constitutes a serious medical need. See McGuckin, 974 F.2d at 1060
21 (serious medical need found where there is chronic and substantial
22 pain).

23 B. Deliberate Indifference

24 Plaintiff claims that defendants' refusal to provide him
25 with knee replacement surgery and to obtain a second opinion from
26 other doctors constituted deliberate indifference. Deliberate
27 indifference requires "a purposeful act or failure to act on the
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1 part of the defendant." McGuckin, 974 F.2d at 1060. It requires a
2 showing of evidence that a prison official knowingly disregarded a
3 substantial risk of serious harm to the plaintiff. Farmer, 511 U.S.
4 at 836-37. To defeat summary judgment on a claim that defendants
5 were deliberately indifferent to a plaintiff's serious medical
6 needs, sweeping conclusory allegations will not suffice; the
7 plaintiff must instead "set forth specific facts as to each
8 individual defendant's deliberate indifference." Leer v. Murphy,
9 844 F.2d 628, 634 (9th Cir. 1988).

10 "A difference of opinion between a prisoner-patient and
11 prison medical authorities regarding treatment does not give rise to
12 a 1983 [deliberate indifference] claim." Franklin v. Oregon, 662
13 F.2d 1337, 1344 (9th Cir. 1981). Similarly, a showing of nothing
14 more than a "difference of medical opinion as to the need to pursue
15 one course of treatment over another is insufficient, as a matter of
16 law, to establish deliberate indifference." Rosado v. Alameida, 497
17 F.Supp.2d 1179, 1188 (S.D. Cal. 2007) (citing Sanchez v. Vild, 891
18 F.2d 240, 242 (9th Cir. 1989)). In order to prevail on a claim
19 involving choices between alternative courses of treatment, a
20 prisoner "must show that the course of treatment the doctors chose
21 was medically unacceptable under the circumstances and . . . that
22 they chose this course in conscious disregard of an excessive risk
23 to plaintiff's health." Id. (citing Jackson v. McIntosh, 90 F.3d
24 330, 332 (9th Cir. 1996)).

25 1. Dr. Friederichs and Dr. Pompan

26 Plaintiff's first claim against Dr. Friederichs and Dr.
27 Pompan is that their refusal to provide him with full knee surgery
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1 constituted deliberate indifference to his serious medical need.
2 Generally, plaintiff's disagreement with his doctor's choice of
3 medical treatment does not give rise to a section 1983 deliberate
4 indifference claim. Franklin, 662 F.2d at 1344. However, plaintiff
5 argues that the following five pieces of evidence raise a triable
6 issue of fact as to whether the treatment chosen (knee surgery
7 rather than full knee replacement) was medically acceptable and/or
8 whether the treatment was chosen with conscious disregard for an
9 excessive risk to his health:

- 10 1) an x-ray taken on August 12, 2009 which plaintiff claims
11 indicates that he needed a full knee replacement (Doc. #19 at
4 and Exh. N),
- 12 2) an MRI taken on May 15, 2006 that plaintiff claims "would
13 infer either full knee replacement surgery or some form of
replacement surgery" (Doc. #19, Exh. F),
- 14 3) an article in the National Bone and Joint Decade of 2002-
15 2011 Handbook which recommends a total knee replacement where
arthritis causes incapacitating pain (Doc. #18 at 4),
- 16 4) Dr. Friederichs' statement that more work would have to be
17 done to his right knee which plaintiff claims is an admission
18 that a full knee replacement would be necessary (Doc. #19 at
9 and Exh. N), and
- 19 5) statements by Santa Clara Valley Medical Center physicians
20 that plaintiff needed a knee replacement.

20 Doc. #18 at 4.

21 Plaintiff fails to raise a triable issue of fact as to
22 whether Dr. Pompan and Dr. Friederichs' failure to provide him with
23 full knee replacement surgery constitutes deliberate indifference.

24 First, plaintiff's interpretation of his x-ray, the MRI
25 results, and Dr. Friederichs' statement is not supported by the
26 record. Dr. Freiderichs' reading of the August 12, 2009 x-ray
27 concludes that there is a spontaneous hemarthrosis of the left knee
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1 with etiology still undetermined and states that an MRI of the left
2 knee might be needed. Dr. Freiderichs' report does not recommend a
3 full knee replacement. Doc. #19 at Exh. N. Similarly, while the
4 May 15, 2006 MRI report concludes that plaintiff has a "[c]omplex
5 year in the anterior horn of the lateral meniscus", it does not
6 recommend a full knee replacement. Doc. #19 at Exh. F. Dr.
7 Friedrichs' statement that plaintiff's knee would require more work
8 cannot be presumed to mean that knee replacement surgery was
9 required. More work could refer to a number of medical treatment
10 options, including continuing observation or additional surgery.

11 To the extent that plaintiff argues that Drs. Pompan and
12 Friederichs should have concluded that a full knee replacement
13 surgery was necessary from the MRI and x-ray results, plaintiff has
14 only made a showing of a difference of opinion as to treatment
15 which, as a matter of law, does not does not give rise to a section
16 1983 deliberate indifference claim. Franklin, 662 F.2d at 1344

17 Secondly, the statements made by Santa Clara Valley
18 Medical Center physicians and the recommended treatment set forth in
19 the National Bone and Joint Decade of 2002-2011 Handbook are merely
20 different medical opinions as to how to treat plaintiff's chronic
21 pain. They are therefore insufficient to establish deliberate
22 indifference. See Rosado, 497 F.Supp.2d at 1188 (citations
23 omitted).

24 Nor has plaintiff raised a triable issue of fact as to
25 whether the course of treatment chosen was "medically unacceptable
26 under the circumstances and . . . that they chose this course in
27 conscious disregard of an excessive risk to [his] health." See id.

1 The record indicates that the doctors have prescribed the following
2 course of treatment for plaintiff's serious medical need: knee
3 surgery, a physical therapy referral, shoe inserts, orthotic boots,
4 a wooden cane, a knee brace, a ground floor cell, a bottom bunk,
5 pain medication and cotton bedding. Plaintiff has not raised a
6 trial issue of fact as to whether these accommodations were
7 medically unacceptable in light of the circumstances. And plaintiff
8 has not pointed to any evidence in the record that indicates that
9 Dr. Friederichs or Dr. Pompan chose this course of treatment in
10 conscious disregard of a risk to plaintiff's health.

11 Plaintiff's second claim is against Dr. Pompan for failing
12 to inform plaintiff that the November 2006 knee surgery would result
13 in plaintiff's right leg being an additional half inch shorter.
14 Plaintiff does not dispute that prior to surgery, Dr. Pompan warned
15 plaintiff that the surgery could fail to address his chronic pain,
16 and possibly increase the pain. However, plaintiff argues that he
17 should have been specifically informed of the shortening of the leg.
18 Plaintiff has not raised a triable issue of fact as to whether Dr.
19 Pompan knew that the leg shortening would be an inevitable effect of
20 the surgery. Dr. Pompan's failure to provide plaintiff with an
21 exhaustive list of the potential outcomes of the surgery does not
22 raise a triable issue of fact as to whether Dr. Pompan knowingly
23 disregarded a substantial risk of serious harm to the plaintiff.
24 See Farmer, 511 U.S. at 836-37.

25 To the extent that plaintiff argues that the leg
26 shortening is an indication of a botched surgery, this assertion is
27 unsupported by the record. The follow up examination with the
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1 plaintiff revealed typical post-operative pain and swelling. Doc.
2 #18, Exh. J. In another follow up on December 26, 2006, plaintiff
3 complained of some stiffness, but stated that his knee was
4 improving. Doc. #18, Exh. K. However, even if the Court assumes
5 that the surgery should not have shortened plaintiff's leg, there is
6 nothing in the record that indicates Dr. Pompan deliberately
7 shortened plaintiff's leg to cause him pain. At most, it was
8 negligence, and is insufficient to establish deliberate
9 indifference. See Estelle, 429 U.S. at 106.

10 Both Drs. Pompan and Dr. Friederichs are entitled to
11 summary judgment as a matter of law.

12 2. Dr. Sepulveda and Dr. Walker

13 Plaintiff also claims that Dr. Sepulveda and Dr. Walker
14 were deliberately indifferent because they denied his complaint
15 requesting full knee replacement. Doc. #18 at 3. Both defendants
16 reviewed plaintiff's medical record when they conducted different
17 level reviews of his complaint. Both denied the complaint after
18 determining that plaintiff's medical file did not indicate a full
19 knee replacement. Doc. #18 at 3. Their decisions reflect their
20 medical opinion as to the appropriate course of treatment for
21 plaintiff, and do not give rise to a section 1983 deliberate
22 indifference claim. See Rosado, 497 F.Supp.2d at 1188.

23 C. Qualified Immunity

24 Defendants claim that, in the alternative, they are
25 entitled to qualified immunity from plaintiff's claim that
26 defendants violated his Eighth Amendment rights by being
27 deliberately indifferent to his serious medical need. Because the
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1 Court finds that no constitutional violation occurred, it is not
2 necessary to reach defendants' qualified immunity argument.

3 CONCLUSION

4 For the foregoing reasons, defendants' motion for summary
5 judgment (Doc. #14) is GRANTED and plaintiff's cross motions for
6 summary judgment (Doc. ## 18 and 19) are DENIED. The clerk shall
7 enter judgment in favor of defendants, terminate all pending motions
8 as moot, and close the file.

9
10 IT IS SO ORDERED.

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12 DATED 03/29/12



THELTON E. HENDERSON
United States District Judge